

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUDITH RIDER,)	
)	No. CV-07-297-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND REMANDING FOR
MICHAEL J. ASTRUE,)	ADDITIONAL PROCEEDINGS
Commissioner of Social)	PURSUANT TO SENTENCE
Security,)	FOUR 42 U.S.C. § 405(g)
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 17, 20.) Attorney Maureen j. Rosette represents Plaintiff; Special Assistant United States Attorney L. Jamala Edwards represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands the matter to the Commissioner for additional proceedings pursuant to sentence four of 42 U.S.C. 405(g).

Plaintiff applied for Supplemental Security Income (SSI) on September 5, 2003. (Tr. 53-59.) She alleges disability due to depression, arthritis and fibromyalgia with an onset date of December 1999. (Tr. 69.) Following a denial of benefits at the initial stage and on reconsideration, a hearing was held before

1 Administrative Law Judge (ALJ) Paul Gaughen on January 30, 2007.
2 (Tr. 314-50.) On February 21, 2007, ALJ Gaughen denied benefits;
3 review was denied by the Appeals Council. (Tr. 6-8, 10-23.) This
4 appeal followed. Jurisdiction is appropriate pursuant to 42 U.S.C.
5 § 405(g).

6 STANDARD OF REVIEW

7 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
8 court set out the standard of review:

9 The decision of the Commissioner may be reversed only if
10 it is not supported by substantial evidence or if it is
11 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
12 1097 (9th Cir. 1999). Substantial evidence is defined as
13 being more than a mere scintilla, but less than a
14 preponderance. *Id.* at 1098. Put another way, substantial
15 evidence is such relevant evidence as a reasonable mind
16 might accept as adequate to support a conclusion.
17 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
18 evidence is susceptible to more than one rational
19 interpretation, the court may not substitute its judgment
20 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
21 *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595,
22 599 (9th Cir. 1999).

23 The ALJ is responsible for determining credibility,
24 resolving conflicts in medical testimony, and resolving
25 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
26 Cir. 1995). The ALJ's determinations of law are reviewed
27 *de novo*, although deference is owed to a reasonable
28 construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

21 SEQUENTIAL PROCESS

22 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
23 requirements necessary to establish disability:

24 Under the Social Security Act, individuals who are
25 "under a disability" are eligible to receive benefits. 42
26 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
27 medically determinable physical or mental impairment"
28 which prevents one from engaging "in any substantial
gainful activity" and is expected to result in death or
last "for a continuous period of not less than 12 months."

1 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
2 from "anatomical, physiological, or psychological
3 abnormalities which are demonstrable by medically
4 acceptable clinical and laboratory diagnostic techniques."
5 42 U.S.C. § 423(d)(3). The Act also provides that a
6 claimant will be eligible for benefits only if his
7 impairments "are of such severity that he is not only
8 unable to do his previous work but cannot, considering his
9 age, education and work experience, engage in any other
10 kind of substantial gainful work which exists in the
11 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
12 the definition of disability consists of both medical and
13 vocational components.

14 In evaluating whether a claimant suffers from a
15 disability, an ALJ must apply a five-step sequential
16 inquiry addressing both components of the definition,
17 until a question is answered affirmatively or negatively
18 in such a way that an ultimate determination can be made.
19 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
20 claimant bears the burden of proving that [s]he is
21 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
22 1999). This requires the presentation of "complete and
23 detailed objective medical reports of h[is] condition from
24 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
25 404.1512(a)-(b), 404.1513(d)).

26 STATEMENT OF FACTS

27 The facts of the case are set forth in detail in the transcript
28 of proceedings, and are briefly summarized here. Plaintiff was 57
years old at the time of the administrative hearing. (Tr. 328.) She
completed 10th grade and completed her high-school equivalency
degree. She went to college in the 1980's and graduated with a
degree in anthropology from the University of Montana. (Tr. 330-
31.) She testified she was married, but separated from her spouse.
She has six adult children and helped raise her teenage
grandchildren. (Tr. 329, 335.) She testified she is supported by
her daughter, and her children and grandchildren assist her with
daily chores. (Tr. 335, 341.) Plaintiff had past work experience
as a receiving clerk in a department store, a potato sorter and

1 babysitter. (Tr. 70, 345.) She testified she was in an automobile
2 accident that caused injury to her knees and now she has arthritis
3 in her knees, hips, shoulders, tailbone and ankles. (Tr. 336.) She
4 stated she could pick up 10 pounds, but could not hold on to it,
5 could only sit for 45 minutes to an hour at a time, walk 10 blocks,
6 and stand for a half hour. She reported she could not bend or squat
7 because of her knees. (Tr. 338-39.) She also testified she
8 suffered from depression for which she had been taking Prozac with
9 little relief. She stated she had been taking Prozac since it came
10 out. (Tr. 340.) She reported her depression affected her ability
11 to concentrate and her memory and she could not sustain work. (Tr.
12 340-41.)

13 ADMINISTRATIVE DECISION

14 The ALJ found Plaintiff had not engaged in substantial gainful
15 activity. At step two, he found Plaintiff has no medically
16 determinable severe impairments, and "does not have an impairment or
17 combination of impairments that has significantly limited (or is
18 expected to significantly limit) the ability to perform basic work-
19 related activities for 12 consecutive months; therefore the claimant
20 does not have a severe impairment or combination of impairments (20
21 C.F.R. 416.921)." (Tr. 15.) After a lengthy discussion of the
22 medical evidence, Plaintiff's testimony, and medical expert
23 testimony, the ALJ found Plaintiff was not credible, and her
24 subjective symptom complaints were not sufficient to establish a
25 severe impairment. (Tr. 21.) He concluded she was not "disabled"
26 as defined by the Social Security Act through the date of the
27 decision. (Tr. 23.)

ISSUES

The question presented is whether there was substantial evidence to support the ALJ's decision denying benefits and, if so, whether that decision was based on proper legal standards. Plaintiff contends the ALJ erred when he found (1) she had no severe impairment; and (2) improperly rejected treating and examining physician opinions; and (3) improperly relied on medical expert testimony. (Ct. Rec. 18 at 11, 12, 15.)

DISCUSSION

Plaintiff contends the medical evidence submitted regarding her mental and physical impairments is sufficient to satisfy the "de minimis" threshold at step two. She argues the ALJ's erroneous rejection of medical source opinions rendered the ALJ's reliance on medical expert testimony reversible error.

A. Medically Determinable Impairments

To satisfy step two's requirement of a severe impairment, the claimant must prove the existence of a physical or mental impairment by providing medical evidence consisting of signs, symptoms, and laboratory findings; the claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated on the basis of a medically determinable impairment which can be shown to be the cause of the symptoms. 20 C.F.R. §§ 404.1529, 416.929. Once medical evidence of an underlying impairment has been shown, medical findings are not required to support the alleged severity of pain or symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991). However, an overly stringent application of the severity requirement violates the

1 statute by denying benefits to claimants who do meet the statutory
2 definition of disabled. *Corrao v. Shalala*, 20 F.3d 943, 949 (9th
3 Cir. 1994). Thus, the Commissioner has passed regulations which
4 guide dismissal of claims at step two. Those regulations state an
5 impairment may be found to be "non-severe" only when evidence
6 establishes a "slight abnormality" that has "no more than a *minimal*
7 *effect* on an individual's ability to work." *Id.* (citing *Social*
8 *Security Ruling (SSR)* 85-28).

9 The ALJ must consider the combined effect of a claimant's
10 impairments, severe and non-severe, on the ability to function,
11 without regard to whether each alone is sufficiently severe. See 42
12 U.S.C. § 423(d)(2)(B) (Supp. III 1991). It is noted on independent
13 review that the ALJ failed to make findings regarding Plaintiff's
14 medically determinable non-severe impairments. (Tr. 15, Finding of
15 Fact 2.) The combined effect of all medically determinable physical
16 and mental impairments should be considered at step three and four.
17 20 C.F.R. § 416.926(a)(c); § 416.945(a)(2). The failure to do
18 so is legal error requiring remand. *Lester v. Chater*, 81 F.3d 821,
19 830 (9th Cir. 1995). Further, the ALJ's finding that "claimant's
20 medically determinable impairment could reasonably be expected to
21 produce the alleged symptoms," when discussing Plaintiff's
22 credibility, is inconsistent with a finding of "no impairment."
23 (Tr. 17.)

24 **B. Severe Impairments**

25 The step two inquiry is a *de minimis* screening device to
26 dispose of groundless or frivolous claims. *Bowen v. Yuckert*, 482
27 U.S. 137, 153-154 (1987). The adjudicator's role at step two is
28

1 further explained by SSR 85-28:

2 A determination that an impairment(s) is not severe
3 requires a careful evaluation of the medical findings
4 which describe the impairment(s) and an informed judgment
5 about its (their) limiting effects on the individual's
6 physical and mental ability(ies) to perform basic work
7 activities; thus, an assessment of function is inherent in
8 the medical evaluation process itself. At the second step
9 of sequential evaluation, then, medical evidence alone is
10 evaluated in order to assess the effects of the
11 impairment(s) on ability to do basic work activities.

12 . . .

13 If . . . evidence shows that the person cannot perform his
14 or her past relevant work because of the unique features
15 of that work, a denial at the "not severe" step of the
16 sequential evaluation process is inappropriate. The
17 inability to perform past relevant work in such instances
18 warrants further evaluation of the individual's ability to
19 do other work considering age, education and work
20 experience.

21 SSR 85-28. The regulations advise the adjudicator that "[g]reat
22 care should be exercised in applying the not severe impairment
23 concept." *Id.*

24 In determining whether a claimant has a severe impairment the
25 ALJ must evaluate the medical evidence submitted and explain the
26 weight given to the opinions of accepted medical sources in the
27 record. The regulations distinguish among the opinions of three
28 types of accepted medical sources: (1) sources who have treated the
claimant; (2) sources who have examined the claimant; and (3)
sources who have neither examined nor treated the claimant, but
express their opinion based upon a review of the claimant's medical
records. 20 C.F.R. § 416.927. A treating physician's opinion
carries more weight than an examining physician's, and an examining
physician's opinion carries more weight than a non-examining
reviewing or consulting physician's opinion. *Benecke v. Barnhart*,

1 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at 830. "As is
2 the case with the opinion of a treating physician, the Commissioner
3 must provide 'clear and convincing' reasons for rejecting the
4 uncontradicted opinion of an examining physician." *Lester*, 81 F.3d
5 at 830 (citation omitted). If the opinion is contradicted, it can
6 only be rejected for specific and legitimate reasons that are
7 supported by substantial evidence in the record. *Andrews*, 53 F.3d
8 at 1043. The testimony of a non-examining medical expert by itself
9 cannot be considered substantial evidence that supports the
10 rejection of an examining physician. *Lester*, 81 F.3d at 831.

11 Here, Plaintiff submitted psychological evaluations from
12 examining psychologists Deborah Brown, Ph.D., Joyce Everhart, Ph.D.,
13 and John Severinghaus, Ph.D. In June 2003, Dr. Brown administered
14 a mini-mental status exam (within normal limits), Trails A and B
15 (within normal limits), a Rey test for malingering, (no malingering
16 exhibited) and a Personality Assessment Index, which showed a "mild
17 exaggeration of symptoms." (Tr. 202.) Dr. Brown diagnosed
18 recurrent major depression and noted Plaintiff "described symptoms
19 of a Borderline Personality Disorder." (Tr. 203.) Dr. Brown also
20 noted Plaintiff's anti-depressant medication did not appear to help
21 her, and suggested adjustments in Plaintiff's medication regime.
22 (*Id.*)

23 In April 2004, Dr. Everhart administered Trails A and B, the
24 Weschler Memory Scale, and the Hamilton Rating Scale for Depression,
25 which indicated "Severe Depression." Testing revealed no affirmative
26 evidence of malingering. (Tr. 139-41.) Dr. Everhart diagnosed
27 depressive disorder, NOS, and personality disorder, NOS. (Tr. 141.)

1 She reported Plaintiff had a good memory, could relate to people,
2 had attention, pace and concentration were within normal limits, but
3 her persistence was compromised by psychological and physical
4 symptoms. (Tr. 142.)

5 In November 2006, Dr. Severinghaus administered the following
6 objective tests: MMPI-2 (suggests overemphasis of pathology); Test
7 of Memory Malinger (TOMM) ("suggestive" of malingering); Trails
8 A and B (within normal limits); and the Weschler Memory Scale III
9 (within normal limits). (Tr. 211.) He opined she had chronic
10 depressed feelings to a moderate level, and "even if she started
11 counseling again, the likelihood of improvement in her functioning
12 is fairly low." (Tr. 212.) He formally diagnosed dysthymia
13 disorder, NOS; anxiety disorder, NOS; pain disorder; possible
14 malingering; and personality disorder. (Tr. 211.) Noting that
15 "depression and anxiety are primary factors here," Dr. Severinghaus
16 assessed marked restrictions in Plaintiff's ability to interact with
17 the public, with supervisors, with co-workers and in her ability to
18 respond appropriately to work pressures in a normal work setting.
19 (Tr. 216.) Consistent with Dr. Everhart's evaluation, he opined
20 her "pace and persistence" were reduced by her depression. (Tr.
21 141, 208.) All three psychologists noted Plaintiff was being
22 treated with medication, had been hospitalized for psychiatric
23 problems and had been in counseling. (Tr. 137, 201, 209, 288.)

24 At the hearing, medical expert Robert Klein, M.D., reviewed the
25 medical evidence and concluded that Plaintiff's mental conditions
26 caused no impairment of activities of daily living, no more than
27 mild limitations in Plaintiff's social functioning, no limitation in
28

1 concentration, persistence and pace, and no episodes of
2 decompensation. (Tr. 318-19.) These opinions conflict with Dr.
3 Brown's and Dr. Severinghaus' findings and are supported only with
4 the conclusions of a non-examining psychologist. (Tr. 143.) The
5 ALJ's rejection of the examining psychologists' diagnoses and
6 opinions on the basis of Dr. Klein's testimony is not supported by
7 substantial evidence. *Lester*, 81 F.3d at 831; *Magallanes v. Bowen*,
8 881 F.2d 747, 751-52 (9th Cir. 1989).

9 At step two, the ALJ also reasoned that "the claimant's
10 complaints of pain and limitations are insufficient to establish a
11 severe impairment."¹ (Tr. 21.) However, medical evidence alone is
12 evaluated at step two to assess the effects of impairment(s). The
13 objective medical evidence confirms depression and personality
14 disorder are "bona fide problems." SSR 85-28. (Tr. 208.) Further,
15

16 ¹ The ALJ appears to rely on Dr. Severinghaus' report in
17 finding Plaintiff's subjective complaints were "not credible." (Tr.
18 22.) Contrary to the ALJ's finding that the TOMM results "confirmed
19 malingering," Dr. Severinghaus opined that the TOMM results were
20 "suggestive" of malingering. (Tr. 20, 211.) Further, Dr.
21 Severinghaus stated there was no evidence of malingering in the
22 Weschler testing results, and diagnosed "possible malingering,"
23 along with several mental disorders. (Tr. 211.) The ALJ's findings
24 of "malingering" are not supported by substantial evidence
25 sufficient to reject all objective medical evidence from examining
26 medical sources at step two. See *Webb v. Barnhart*, 433 F.3d 683,
27 687 (9th Cir. 2005).
28

1 Plaintiff's subjective complaints are consistent with the diagnosis
2 of depression and personality disorder. Therefore, these mental
3 conditions are not "groundless under the *de minimis* standard of step
4 two." *Webb*, 433 F.3d at 688. For step two purposes, the Plaintiff
5 met her burden of providing objective medical evidence consisting of
6 signs, symptoms, and laboratory findings of mental disorders, as
7 well as medical records documenting the ongoing treatment with
8 medication. 20 C.F.R. § 416.926; *Webb*, 433 F.3d at 687. This
9 evidence establishes more than "slight abnormality" in Plaintiff's
10 mental condition. Remand is necessary for new step two findings and
11 to continue the sequential evaluation process. On remand, the ALJ
12 shall assess limitations based on all medically determinable severe
13 and non severe impairments.

14 **C. Obesity**

15 The ALJ also failed to factor in Plaintiff's documented obesity
16 in combination with arthritis, as diagnosed by Dr. Roy Brown, and
17 Plaintiff's diagnosed depression. (Tr. 132, 160, 196.)² While

18
19 ² Records from treating physician E. Quick, M.D., indicate a
20 diagnosis of obesity. (Tr. 132.) As discussed in the Commissioner's
21 policy rulings:

22 When establishing the existence of obesity, we
23 will generally rely on the judgment of a
24 physician who has examined the claimant and
25 reported his or her appearance and build, as
26 well as weight and height. Thus, in the absence
27 of evidence to the contrary in the case record,
28 we will accept a diagnosis of obesity given by
a treating source or by a consultative
examiner. However, if there is evidence that
indicates that the diagnosis is questionable
and the evidence is inadequate to determine

1 obesity has been eliminated as a Listing, it can constitute the
2 equivalence of a Listing. Social Security Ruling 02-01p addresses
3 the significance of obesity in the sequential evaluation process.
4 The current prefaces to the musculoskeletal, respiratory and
5 cardiovascular body system Listings provide guidance about the
6 potential effects obesity has in causing or contributing to
7 impairments in those body systems. See, e.g., 20 C.F.R. Part 404,
8 Subpt. P, App. 1, Section 1.00Q. In addition, according to the
9 Commissioner, "obesity may cause or contribute to mental impairments
10 such as depression." SSR 02-01p. The Ruling recognizes that obesity
11 will constitute a severe impairment when "it significantly limits an
12 individual's physical or mental ability to do basic work
13 activities." SSR 02-01p.

14 Additionally, obesity must be considered at step four of the
15 process because it can cause postural limitations of function. An
16 assessment should be made of the effect obesity has upon the
17 individual's ability to perform routine movement and necessary
18 physical activity within the work environment. *Id.* Here the ALJ
19 did not adequately consider Plaintiff's obesity at any step of the
20 sequential process. A failure to consider obesity is reversible
21 error.

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23
24 whether or not the individual is disabled, we
25 will contact the source for clarification,
26 using the guidelines in 20 CFR 404.1512(e) and
27 416.912(e).

28 SSR 02-01p (*How Is Obesity Identified as a Medically Determinable
Impairment?*).

1 **D. Remedy**

2 Because a step two determination that an impairment is severe
3 "only raises a *prima facie* case of a disability," Plaintiff may not
4 succeed in proving she is "disabled" (as defined by the Social
5 Security Act) at step two. The full five step sequential evaluation
6 is necessary to ascertain whether there are jobs Plaintiff can
7 perform. *Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007)
8 (*citing Tackett*, 180 F.3d at 1100). As stated by the *Hoopai* court,

9 [T]he satisfaction of the step-two threshold requirement
10 that a claimant prove her limitations are severe is not
11 dispositive of the step five determination of whether the
12 non-exertional limitations are sufficiently severe such as
to invalidate the ALJ's exclusive use of the [Medical-
Vocational Guidelines] without the assistance of a
vocational expert.

13 *Id.* at 1078.

14 Conversely, a reasonable ALJ may find Plaintiff "disabled" upon
15 consideration throughout the sequential evaluation process of all
16 limitations caused by medically determinable impairments (severe and
17 non-severe) in combination (as required by 20 C.F.R. §§ 404.1523,
18 416.923). *Stout v. Commissioner, Social Sec. Admin.*, 454 F.3d 1050,
19 1056 (9th Cir. 2006).³ Because Plaintiff is prejudiced by the
20 improper exclusion of all diagnosed impairments, physical and
21 mental, as well as obesity, remand for further proceedings is
22 appropriate. *Id.* at 1057. On remand, additional medical evidence

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24 ³ Plaintiff contends the Medical Vocational Guidelines would
25 dictate a finding of "disabled" if Plaintiff were found limited to
26 sedentary work with non-transferrable skills. 20 C.F.R. Part 404,
27 Subp. P, App. 2, Table 1. (Tr. 290.)

1 may be submitted, including imaging, additional consultive
2 psychological examinations and, if available, treatment records.
3 Accordingly,

4 **IT IS ORDERED:**

5 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is
6 **GRANTED**. The matter is remanded to the Commissioner for additional
7 proceedings pursuant to 42 § U.S.C. 405(g) and the decision above.

8 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
9 **Rec. 20**) is **DENIED**.

10 3. Application for attorney fees may be made by separate
11 motion.

12 The District Court Executive is directed to file this Order and
13 provide a copy to counsel for Plaintiff and Defendant. The file
14 shall be **CLOSED** and judgment entered for **Plaintiff**.

15 DATED October 10, 2008.

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17 S/ CYNTHIA IMBROGNO
18 UNITED STATES MAGISTRATE JUDGE
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